NO. 99-106

In The

SUPREME COURT OF THE UNITED STATES

FRATERNAL ORDER OF POLICE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

REPLY BRIEF OF THE PETITIONER

On a Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS

Table of Contents	2
Table of Authorities	3
Reply Argument	4
Conclusion	10

TABLE OF AUTHORITIES

U.S. CONSTITUTIONAL PROVISIONS

Art. I, § 8, cl. 3 (commerce clause)	4,6, 10
Art. I, § 8, cl. 15, 16 (militia clause)	6,7,8,10
Art. VI, cl. 2 (supremacy clause)	5
U.S. Const. Amendment 2	6-8,10-11
U.S. Const. Amendment 10	4,5, 8,9,11

CASES CITED

Alden v. Maine, 1999 U.S. LEXIS 4374 (June 23, 1999)	6-9,11
General Oil Co. v. Crain, 209 U.S. 211 (1908)	11
Gillespie v. Indianapolis, 185 F.3d 693 (7th Cir. 1999), 1999 U.S. App. LEXIS 15117	4-5
Gregory v. Ashcroft, 501 U.S. 452 (1991)	4,7
New York v. United States, 505 U.S. 144, 166 (1992)	8,10
Perpich v. Department of Defense, 496 U.S. 334 (1990)	6
Printz v. United States, 521 U.S.898 (1997)	8-10
United States v. Lopez, 514 U.S. 549 (1995).	6
United States v. Miller, 307 U.S. 174 (1939)	6

Federal Statutes

18 U.S.C. § 922(d)(9) (Supp.III 1997)	9
18 U.S.C. § 922(g)(9) (Supp.III 1997)	9
18 U.S.C. § 924(a)(2) (1994)	9
18 U.S.C. § 925 (Supp.III 1997)	4,7,8
18 U.S.C. § 926 (1986)	6,8

REPLY ARGUMENT

The government's Brief in Opposition relies extensively on a recent Seventh Circuit decision addressing the same amendments to the Gun Control Act at issue in this case.[1] ***See*** Government's Brief at 7-8; 10-11 citing ***Gillespie v. Indianapolis,*** 185 F.3d 693 (7th Cir. 1999), 1999 U.S. App. LEXIS 15117. The government's reliance is misplaced because the Seventh Circuit decision is rooted in prior decisions regarding *private* firearms and this is a first impression case involving *public interest* firearms. ***See*** 18 U.S.C. §925(a) (Supp.III 1997). Both the government and the Seventh Circuit have ignored this Court's express statements that the power to regulate interstate commerce, Art. I, § 8, cl., is intrinsically limited and is not a plenary police power and is extrinsically limited by the Tenth Amendment which reserves whole areas of state sovereignty inviolable. ***See e.g. Gregory v. Ashcroft***, 501 U.S. 452, 461 (1991)(federal government may not displace "state decisions that 'go to the heart of representative government.'")

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1. The Seventh Circuit decision involves a rank and file police officer rather than Chief Law Enforcement Officers (CLEOs). The Seventh Circuit also held the amendments constitutional. The decision came down on July 9, 1999, on or about the time the Petition was filed in this case. Accordingly, Petitioner had no opportunity to alert this Court to the deficits in the Seventh Circuit's discussion of the issues. This Reply will be followed on October 7, 1999 by a Petition for Certiorari from the Seventh Circuit case, ***Gillespie v. Indianapolis,*** 185 F.3d 693 (7th Cir. 1999), 199 U.S. App. LEXIS 15117 A Motion to Consolidate review of the two petitions will be submitted with the ***Gillespie*** petition.

THE GOVERNMENT'S BRIEF IN OPPOSITION FAILS TO IDENTIFY ANY LIMITATION ON FEDERAL POWER OVER STATE OFFICERS THAT DELIVER, RECEIVE, AND TRANSPORT FIREARMS IN THE DISCHARGE OF THEIR STATE DUTIES AND RELIES ON A SEVENTH CIRCUIT OPINION THAT MISTAKENLY CONCLUDES CONGRESS HAS PLENARY AUTHORITY OVER THE PEOPLE'S RIGHT TO SELECT THE CITIZENS IT WISHES TO ARM IN THE PUBLIC INTEREST.

The Government quotes the Seventh Circuit:

> Nor is it constitutionally significant that the firearms ban now happens to include individuals employed in state and local law enforcement or who would otherwise be qualified to serve in state militias.

Government's Brief at 8 citing ***Gillespie,*** 1999 U.S. App. LEXIS 15117 at *31. The Seventh Circuit's conclusion is premised on the rule arising from cases involving private firearms that "Congress has the power to regulate the interstate trade in firearms." 1999 U.S. App. LEXIS 15117 at *28. Completing its mistaken line of reasoning, the ***Gillespie*** court said, "[T]he Supremacy clause [Art. VI, cl.2] permits Congress to trump state policies on subjects that Article I empowers Congress to address." ***Gillespie,*** 1999 U.S. App. LEXIS 15117 at *35. Neither the government nor any Circuit court has identified a single case that declares firearm possession by law enforcement or state militia members a commercial event subject to federal regulation.

Reliance on cases involving private firearms to conclude Congress has power over public interest weapons and rote rejection of the Tenth Amendment claim through talismanic invocation of the Supremacy Clause, is contrary to the history, practice, precedent and

structure of our federal Constitution and amounts to an abdication of the independent judicial duty to evaluate Congressional enactments for *ultra vires* action. ***United States v. Lopez,*** 514 U.S. 549, 563 (1995); ***Alden v. Maine,*** 1999 U.S. App. LEXIS 4374 at *46 ("We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States.").

Moreover, neither the Seventh Circuit's decision, nor the government's brief responds to the contention that the Second Amendment and the Militia clauses, U.S. Const., Art. I, § 8, cl. 15, 16, bar federal interference with public interest weapons issued by the States, regardless of the source or prior transactional history of the firearm. In fact, most cases involving private firearms cite to this Court's cases that expressly reserve some inviolable, protected militia-related space into which a *private* firearm might fall. ***See e.g. United States v. Miller,*** 307 U.S. 174, 178 (1939) (the Second Amendment protects a right to keep and bear a firearm that bears "some reasonable relationship to the preservation or efficiency of a well regulated militia"); ***see also Perpich v. Department of Defense,*** 496 U.S. 334 (1990)(presupposing inviolable right of the States to engage in militia basic training and states' ability to rely on their own Guard in state emergency situations); Firearms Owners' Protection Act, §1(b), 100 Stat. 449 (1986) (codified at 18 U.S.C. §926 (1986))(hereinafter "FOPA")(noting GCA purpose of preserving Second and 10th Amendment rights) If *private* firearms may be shielded from federal regulation by a connection to a State militia, it is

inescapably evident that *public interest* firearms relied upon by the People to enforce executive and judicial decrees, and to protect their interests in times of emergency, are beyond the reach of federal control under the commerce clause. ***See e.g.*** 18 U.S.C. §925 (1994)

In the absence of a construction of the Second Amendment and Militia clauses by this Court that authorizes Congress to control state firearm possession through its commerce clause power, there is no textual basis for the asserted power. This Court recently said, the Federal Government,

> [C]an claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

Alden v. Maine 1999 U.S. LEXIS 4374 at *58 (citations omitted)

Whether expressed as an intrusion upon the State's prerogative to establish officer qualifications under the Militia clause and ***Gregory v. Ashcroft***, 501 U.S. 452, 460 (1991) or an intrusion into inviolable areas of state sovereignty carved out by the Second Amendment and Militia clauses, a serious federalism question exists that cannot be brushed aside by citation to cases authorizing federal control over privately trafficked and possessed firearms. The question before this Court is whether Congress has the power to interfere with the People's right to arm its citizens with public interest weapons, not whether Congress has the power to regulate purely private firearm transactions and possession.

> [E]ven as to matters within the competence of the National Government

> * * * the States retain "a residuary and inviolable sovereignty."

Alden v. Maine, 1999 U.S. App. LEXIS 4374 at *16 (citing The Federalist No. 39).

> E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . .

New York v. United States, 505 U.S. 144, 166 (1992). Under the government's reading of the Constitution and this Court's decisions, 18 U.S.C. §925(a) is simply Congress' statement of the extent of federal displacement of state prerogative. By this rationale, the gate is open for Congress to effectively disarm any state militia and any law enforcement officer and any State governor by simply declaring all misdemeanor convictions, including traffic offenses, trigger new federal firearm possession bans. Congress is mistaken about the extent of its powers; if §925(a)(1) did not exist, it would have to be invented. It is the provision that allowed the Gun Control Act of 1968 to pass Tenth Amendment, Second Amendment and Militia Clause muster. ***See e.g.*** Firearms Owners' Protection Act, §1(b), 100 Stat. 449 (1986) (codified at 18 U.S.C. § 926 (1986))(hereinafter "FOPA")(noting GCA purpose of preserving Second and 10th Amendment rights); ***see also Printz v. United States***, 521 U.S. 898, 905 91997)(historical evidence that "earlier Congresses avoided use of [the] highly attractive power [to compel state executive officers to administer federal programs]" gave us "reason to believe that the power was thought not to exist"); ***accord Alden v. Maine,*** 1999 U.S. LEXIS 4374 at *65 (citing ***Printz*** noting early Congressional practice suggests no power over state issued firearms).

THE GOVERNMENT'S BRIEF IN OPPOSITION RESURRECTS THE DISCREDITED NOTION THAT THE FEDERAL GOVERNMENT MAY OBVIATE THE TENTH AMENDMENT BY DIRECTLY CONSCRIPTING INDIVIDUAL STATE OFFICERS RATHER THAN THE STATES.

It is undisputed that the Bureau of Alcohol, Tobacco and Firearms construe the 1996 GCA amendments as imposing obligations upon CLEOs. ***See A/53-58*** (Open Letter from ATF to CLEOs) Despite the government's assertion to the contrary, Government's Brief at fn3, it is impossible to read the criminal penalties for transfer of a weapon to a person disabled by 18 U.S.C. §922(g)(9) as anything but a federal command to a state CLEO to refuse to arm a police officer in good standing under state law. ***See*** 18 U.S.C. §922(d)(9) and 18 U.S.C. §924(a)(2). CLEOs provide public interest weapons to the rank and file and it is undisputed that CLEOs are required to deliver firearms to sworn officers pursuant to the CLEOs' state-law based duties.

> The Brady Act, the dissent asserts, is different from the "take title" provisions invalidated in New York because the former is addressed to individuals – namely CLEOs – while the latter were directed to the State itself. That is certainly a difference, but it cannot be a constitutionally significant one. While the Brady Act is directed to "individuals," it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State. * * *
>
> And the same must be said of a directive to an official in his or her official capacity. To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance.

Printz, 521 U.S. 898, ___, 117 S.Ct. 2365 at 2382 (1997). Criminal penalties for refusal to carry out a federal mandate fall within the bar on state officer conscription described in the

foregoing quotation from ***Printz.***

CONCLUSION

As the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' entitlement to select its militia officers and to arm those it deems best suited to carry public interest weapons is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. The 1996 GCA amendments violate the structure of federalism by impugning the States' inviolable authority secured by the Second Amendment and Militia clauses. The possession or delivery of a firearm by a state officer executing state duties is, quite simply, not a commercial event within the purview of Congress' commerce clause authority.

The principle that "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States", ***New York, supra,*** 505 U.S. at 166, should not be taken as an authorization to achieve indirectly that which cannot be directly achieved. ***Accord Printz, supra,*** 521 U.S. at 919-920 (quoting The Federalist No. 15, at 109). Criminal penalties that force an officer of a state to choose between fulfilling state-law duties or facing federal criminal prosecution constitutes an end-run around the bar raised against federal interference with State sovereignty.

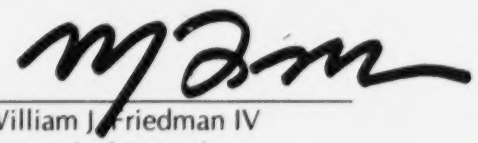
As this Court recently said in ***Alden,*** 1999 U.S. LEXIS 4374 at *41-42, reliance on the mere words of the Eleventh Amendment alone "would be to engage in the type of ahistorical

literalism we have rejected in interpreting the scope of the States' sovereign immunity..." To construe the Second Amendment as a nullity and to render the Tenth Amendment useless in settings where federal criminal penalties compel action by state officers, is to usurp the powers reserved to the People. Such a strained reading of the Constitution cannot stand.

> It seems to be an obvious consequence that as a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the Eleventh Amendment of the Constitution of the United States...

General Oil Co. v. Crain, 209 U.S. 211 (1908) Control over public interest firearms confers a power and a leverage over the States that is not contemplated by our constitutional design and foreshadows a potential national power that poses a severe and notorious danger to the States and their resources.

Respectfully submitted,



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I hereby certify that the original and all copies required by rule of the foregoing Reply Brief were sent by Federal Express Seth Waxman, Solicitor General, United States Department of Justice, 950 Pennsylvania Ave., NW, Washington D.C. 20530-001 this 6th day of October 1999.

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